BLANK

PAGE

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWE A. STIDGER and BETTY M. STIDGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (Appendix, *infra*, pp. 8–15) is reported at 40 T.C. 896. The opinion of the court of appeals (Appendix, *infra*, pp. 16–30) is reported at 355 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1965. (Appendix, *infra*, p. 31.) By orders of Mr. Justice Douglas the time for filing a petition for a writ of certiorari was extended to and including May 26, 1966.

218-855—66——1

QUESTION PRESENTED

Whether amounts expended for meals by a military officer stationed at a permanent duty post to which he is prohibited from bringing his family constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" or non-deductible "personal" or "living" expenses, under the pertinent provisions of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 162. Trade or Business Expenses.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

(26 U.S.C. (1958 ed.) 162.)

SEC. 262. Personal, Living, and Family Expenses.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. (1958 ed.) 262.)

STATEMENT

Respondent,[1] now retired, was, during 1957 and 1958, a captain in the United States Marine Corps. For approximately 2½ years preceding October, 1957, he had been attached to a Marine air squadron stationed at El Toro, California. During this period he lived with his family in nearby Santa Ana. On October 1, 1957, respondent, together with his component, was assigned to a new permanent duty station in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, for 15 months. On that date respondent departed from El Toro, California for Iwakuni, Japan. Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, were prohibited by Marine Corps orders from accompanying such personnel to the Far East. Accordingly, during respondent's 15 month tour of duty abroad, his family continued to reside in Santa Ana, California. While stationed at Iwakuni, the Marine Corps furnished respondent free quarters. Like all commissioned officers, he was, however, required to pay for his own meals, which the Marine Corps supplied for approximately $2.00 per day.[2] Moreover, respondent also received $145 per month as a non-taxable housing and subsistence allowance for himself and his family. In December, 1958, re-

[1] Mrs. Stidger is a party solely because a joint return was filed for 1958. We refer to Mr. Stidger as respondent.

[2] During the brief periods that respondent was away from Iwakuni on official business he was classified as on temporary assignment or in travel status away from his permanent duty station and was reimbursed for the cost of his meals.

spondent was assigned to a new permanent duty station at the Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962. (Appendix, *infra*, pp. 8–10, 17–18.)

On his 1958 return respondent deducted the $650 he had spent for meals at Iwakuni, Japan. The Commissioner disallowed the deduction. The Tax Court found that respondent's stay at Iwakuni was "not temporary," and that during 1958 his "home" within the meaning of Code § 162(a)(2) was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling * * * away from home." (Appendix, *infra*, pp. 10–15.)

The court of appeals, one judge dissenting, reversed the Tax Court on the ground that respondent's "home" was his family residence in California, and that he was thus "away from home" while stationed at Iwakuni. (Appendix, *infra*, pp. 16–30.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Bercaw* v. *Commissioner*, 165 F. 2d 521. In that case the taxpayer was an Army officer who served at Fort Meade, Maryland, during 1941. Since no quarters were available at Fort Meade to house his family, they lived about 160 miles away in Virginia. The Army furnished quarters for the taxpayer at Fort Meade, and he ate in an officers' mess which cost $1.25 per day. The Army also paid him non-taxable monthly housing and subsistence allowances of $116. The taxpayer claimed that the cost of

his meals at Fort Meade was deductible under the predecessor to the statute here in question. Both the Tax Court and the Fourth Circuit denied the deduction on the ground that Fort Meade, his permanent duty station, constituted his "home" within the meaning of the statute and that he was thus not "traveling * * * away from home" while at Fort Meade.

The *Bercaw* case is similar to the instant case in all material respects. In both cases officers in the Armed Services were forced—either by orders or by the unavailability of housing—to live apart from their families. Both received free lodging at their permanent duty stations but were required to pay for their own meals (which were supplied by the military at a relatively low cost). Both received non-taxable monthly housing and subsistence allowances. Nevertheless, in *Bercaw* the Court of Appeals for the Fourth Circuit denied the claimed deduction whereas in the instant case the Court of Appeals for the Ninth Circuit allowed the deduction.

The issue presented by this case is important and continuing. We have been advised by the Defense Department that there are now approximately 25,000 commissioned officers serving overseas at permanent duty stations to which they cannot take their families.

2. The decision below is erroneous. Respondent manifestly was not away from *his* home while at Iwakuni, Japan. Iwakuni was designated as respondent's permanent duty station in October 1957, and with the exception of several brief assignments he lived and worked there for the next 15 months until

he was transferred to a new permanent duty station at Cherry Point, North Carolina. Regardless of whether his family was permitted to accompany him, his "home" for purposes of § 162(a)(2) was at Iwakuni where he lived and performed his regular duties.

Armed Services' officers are, throughout their careers, periodically transferred from one permanent duty post to another. They, therefore, must expect to be parted from their families at times. The government, however, has taken steps to insure that these separations do not impose any undue financial burden on such officers. They are furnished free housing during separations and their meals are supplied at a relatively low cost. They are given non-taxable housing and subsistence allowances for themselves and their families. When an officer is sent overseas to a place where his family cannot accompany him, the government will move his family to whatever domestic location he selects. Finally, military personnel are given a large number of tax advantages in addition to tax-free housing and subsistence allowances. See, *e.g.*, 1954 Code §§ 112, 113 (combat pay and mustering out payments).

In light of these factors, we do not believe that Congress meant § 162(a)(2) to give military officers a deduction for the cost of meals at their permanent duty stations where they regularly live and work. See Rev. Rul. 55–571, 1955–2 Cum. Bull. 44. Rather, we submit that, in such circumstances, the cost of an officer's meals constitutes a personal or living expense, which is specifically made non-deductible by § 262 of the Code.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General,

JACK S. LEVIN,
Assistant to the Solicitor General,

ROBERT N. ANDERSON,
MORTON K. ROTHSCHILD,
Attorneys,

MAY 1966.

APPENDIX

40 T.C. No. 97

Tax Court of the United States

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2131–62. Filed September 3, 1963

ARUNDELL, *Judge:* Respondent determined a deficiency in income tax for the calendar year 1958 in the amount of $180.10.

The only issue is whether petitioner, Howe A. Stidger, is entitled to deduct, during 1958, as traveling expenses while away from home in pursuit of a trade or business, an amount of $650 for meals while stationed in the Far East.

FINDINGS OF FACT

The stipulated facts are so found and are incorporated herein by this reference.

Petitioners, husband and wife, are individuals now residing in Sacramento, California. At the time they filed their petition they were residing at Cherry Point, North Carolina. The joint return for the calendar year 1958 was filed with the district director of internal revenue at Greensboro, North Carolina. Petitioner, Howe A. Stidger, will hereinafter sometimes be referred to as petitioner.

Petitioner was a Captain in the United States Marine Corps during the taxable year 1958. He is now

retired but prior to his retirement in July 1962, he had continually served as an active member of the Corps since 1942. Approximately two and one-half to three years preceding October 1, 1957, petitioner was attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, petitioner, together with his component, were assigned to duty in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana), California.

Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, in the Far East, were prohibited by Marine Corps orders to accompany said personnel or establish homes in the Far East.

During the entire year 1958 petitioner's wife and two children resided at Santa Ana, California.

Throughout the entire year 1958 petitioner received a housing allowance of approximately $102.50 per month and subsistence allowance of approximately $42.50 per month.

On October 1, 1957, petitioner departed from El Toro, California. Petitioner's itinerary from October 1957 to December 1958 was as follows:

Date	Place	Approximate number of days
1 Oct 57 to 20 Feb 58	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan	142
21 Feb 58 to 7 Mar 58	Cubi Point, Philippine Islands	14
8 Mar 58 to 19 Apr 58	Iwakuni, Japan	42
20 Apr 58 to 23 May 58	Naha AFB, Okinawa	33
24 May 58 to 10 Aug 58	Iwakuni, Japan	78
11 Aug 58 to 29 Aug 58	Yokosuka, Japan	18
30 Aug 58 to 1 Sep 58	Iwakuni, Japan	2
2 Sep 58 to 19 Sep 58	San Diego, Calif.	17
20 Sep 58 to 25 Sep 58	Iwakuni, Japan	5
26 Sep 58 to 10 Oct 58	Naha AFB, Okinawa	14
11 Oct 58 to 14 Dec 58	Iwakuni, Japan	64
15 Dec 58 to 19 Dec 58	Travel to MCAS El Toro, Calif.	4

Paragraph 9 of the stipulation is as follows:

> 9. During the year 1958, petitioner was placed in travel status for forty-nine days and, in addition to his normal housing and subsistence allowance, his expenses for meals and lodging were reimbursed. Petitioner does not claim travel expenses for the forty-nine days that he received reimbursement for the costs of meals and lodging.

Commissioned officers pay for their own meals at an official duty station; however, if they are on temporary assignment or in travel status, they are reimbursed for their meal expenses.

During the periods that petitioner was located at Iwakuni he received free lodging in addition to his housing and subsistence allowance but was not in travel status and he therefore did not receive free meals.

While in the Far East in 1958, except for the 49 days he was placed in travel status, petitioner had to pay for his own meals which cost him $650.

On the joint return for 1958 petitioner deducted the $650 he spent for meals. Respondent disallowed the deduction for the reason that "it has not been established that the amount claimed constitutes an ordinary and necessary business expense."

Petitioner completed his tour of duty in the Far East in December 1958 and was thereafter assigned to duty at Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July 1962.

ULTIMATE FINDING OF FACT

During the taxable year 1958 petitioner's tax home was his military post of duty in the Far East. His stay there was indefinite, indeterminate, or permanent and not temporary.

OPINION

The issue is whether petitioner is entitled to deduct, under sections 62(2)(B) and 162(a)(2), I.R.C. 1954,[1] the $650 he spent during 1958 for meals while stationed in the Far East. The corresponding provisions of the 1939 Code were sections 22(n)(2) and 23(a)(1)(A). In *Commissioner* v. *Flowers*, 326 U.S. 465, the United States Supreme Court declared that three conditions must be satisfied before a traveling expense deduction may be allowed under section 23(a)(1)(A) and that "Failure to satisfy any one of the three conditions destroys the traveling expense deduction." The three conditions were stated thus:

> (1) The expense must be a reasonable and necessary traveling expense, as that term is

---

[1] SEC. 62. Adjusted Gross Income Defined.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * * * *

"(2) Trade and business deductions of employees.—"

* * * * *

"(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee."

SEC. 162. Trade or Business Expenses.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

In the *Flowers* case the Supreme Court held that the taxpayer there did not satisfy the third condition. In the instant case we do not think petitioner has satisfied the second condition.

Petitioner contends that during 1958 his "home" was in Santa Ana, California, where his wife and children were residing and that, therefore, the expenses in question were incurred "while away from home." "Home" as used in the statute means the taxpayer's principal place of business, employment, or post or station at which he is employed. *Mort L. Bixler*, 5 B.T.A. 1181; *Raymond E. Kershner*, 14 T.C. 168, 174; *James R. Whitaker*, 24 T.C. 750; *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C.A. 2, 1957), affirming *per curiam* a Memorandum Opinion of this Court. In the *O'Toole* case the Second Circuit said:

> Upon these facts the Tax Court found that petitioner's home, for the purpose of the statute, was at Long Beach where he was engaged in full time employment and that petitioner's maintaining another home at Laurelton was "immaterial." * * * This finding is clearly correct.

If, however, petitioner's place of employment may be said to be temporary as distinguished from indefinite, indeterminate or permanent, a deduction for traveling expenses while away from home may be allowed. *Harry F. Schurer,* 3 T.C. 544; *E. G. Leach,* 12 T.C. 20. Cf. *Beatrice H. Albert,* 13 T.C. 129. In *Leo C. Cockrell,* 38 T.C. 470, 479, on appeal to C.A. 8, we said:

> This Court and other courts have allowed a deduction for expenditures for travel including meals and lodging when a taxpayer's employment at the place where such expenditures are made is temporary as contrasted with indefinite or indeterminate. *Peurifoy* v. *Commissioner,* 358 U.S. 59, 61 (1958), and cases there cited. What constitutes "temporary" as distinguished from "indefinite" is a question of fact. * * *.

Although petitioner's tour of duty in the Far East was for a period of approximately 15 months, we do not think it can be said to be a temporary assignment. While 15 months may have lacked real permanence, "the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses." *Floyd Garlock,* 34 T.C. 611, 616. Cf. *Beatrice H. Albert, supra.* We have found as an ultimate fact that petitioner's stay in the Far East was not temporary.

We think the facts in the instant case are very much like the facts in *Bercaw* v. *Commissioner,* 165 F. 2d 521 (C.A. 4, 1948), affirming a Memorandum Opinion of this Court; and *James R. Whitaker, supra.* See also Rev. Rul. 55–571, 1955–2 C.B. 44.

In *Bercaw* the taxpayer was an Army Captain who was stationed in Fort Meade, Maryland. He claimed a deduction for money spent for meals at Fort Meade

and for weekend trips to his home in Virginia. We disallowed the claimed deduction. In affirming our holding, the Fourth Circuit, among other things, said:

> The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance which would not have been taxable. *Jones* v. *United States*, 60 Ct. Cl. 552. But whenever he made a permanent change of station that place of duty became his place of business and there was his "home" within the meaning of Section 23(a)(1)(A). See *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203; *Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210. Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible * * *. This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation.

In *James R. Whitaker, supra*, the taxpayer was a civil engineer residing at Hawarden, Iowa, where he maintained a home for himself and his family. In February 1951 he commenced work as an assistant project engineer for North Atlantic Constructors, a joint venture operating under a contract with the Department of Army for the performance of certain off-shore construction in the general vicinity of Thule, Greenland. The exact location of the job site was a military secret. He was in Thule from December 15, 1951, to January 5, 1952; from April 8, 1952, to August 12, 1952; and from August 29, 1952, to No-

vember 26, 1952. The taxpayer's family was not permitted to accompany him to Greenland. Whenever he left Greenland he was reimbursed for traveling expenses incurred with the exception of one trip. In his 1952 income tax return the taxpayer claimed board and lodging expenses while at Thule, Greenland. He spent a total of 222 days in Thule during the taxable year 1952. In disallowing the claimed deduction, we said:

> Here, although petitioner contends Thule was not his main post of duty or principal place of business, we think the facts call for the ultimate finding that it was. The fact that petitioner was not permitted to take his family to Thule so that he had no choice in the matter, does not help petitioner. * * *

The facts in the instant case are distinguishable from those in *Laurence P. Dowd,* 37 T.C. 399, relied upon by petitioner, in that the evidentiary facts in *Dowd* showed that Dowd's employment in Japan during 1956 and 1957 was temporary as contrasted with indefinite, indeterminate, or permanent.

We hold petitioner is not entitled to deduct the $650 spent for meals during the taxable year 1958.

Decision will be entered for the respondent.

United States Court of Appeals for the Ninth Circuit

No. 19630

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[December 27, 1965]

On Petition To Review a Decision of The Tax Court of the United States

Before: MERRILL, BROWNING and ELY, Circuit Judges

PER CURIAM:[1]

This is another of those troublesome cases involving the question whether certain travel expenses incurred by a taxpayer were incurred while "away from home" and are deductible for federal income tax purposes under section 162 of the Internal Revenue Code of 1954. At the time the deduction involved here was claimed, section 162 read in pertinent parts.[2]

> "(a) In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year

[1] This opinion was written by Judge William E. Orr. Following Judge Orr's death on October 7, 1965, Judge Browning was assigned to the panel and the case was reargued. The majority of the court as now constituted adopts Judge Orr's opinion as its own.

[2] Section 162(a)(2) was amended in 1962 by striking out "(including the entire amount expended for meals and lodging)" and inserting in lieu thereof "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Revenue Act of 1962, § 4(b), CCH Stand. Fed. Tax Rep. 85, 100 (extra ed. No. 44). This amendment is not involved in the case before us.

in carrying on any trade or business, including * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *"

The facts, found by the Tax Court as stipulated, are substantially as follows. During the taxable year 1958 taxpayer was a captain in the United States Marine Corps. For approximately two and one half years prior to October 1, 1957, he had been attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, taxpayer, together with his component, was assigned to duty in the Far East with the First Marine Aircraft Wing, a part of the Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana) California. It was impossible for taxpayer to be accompanied abroad by his family because Marine Corps orders prohibited dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, from accompanying such personnel or establishing homes in the Far East. During taxpayer's entire tour abroad his wife and two children remained at the family's established home in Santa Ana, California.

Commissioned officers pay for their own meals at an official duty station unless they are considered to be on a temporary assignment or in travel status, in which cases they are reimbursed for their meal expenses. Taxpayer's principal duty station while in the Far East was Iwakuni, Japan. While at Iwakuni he received free lodging; but as he was not considered to be on travel status while there, he did not receive free meals. During 1958, except for forty-nine days during which he was placed on travel status while

absent from Iwakuni and reimbursed for travel expenses, taxpayer had to pay for his own meals at a cost to him of $650.

On his joint return for 1958 taxpayer deducted the $650 as a travel expense incurred while away from home. The Commissioner disallowed the deduction and claimed a deficiency. Taxpayer petitioned the Tax Court for a redetermination of the alleged deficiency, and the Tax Court found as ultimate facts that during the taxable year taxpayer's "tax home" was his military post of duty in the Far East, and that his stay there was "indefinite, indeterminate, or permanent and not temporary." Accordingly, the Tax Court found that the expenses in question were not incurred while traveling "away from home" within the meaning of section 162(a)(2) and therefore were not deductible. On appeal from the decision of the Tax Court, we are faced squarely with the question of the meaning of "home" within section 162(a)(2).

Examination of the legislative history surrounding the introduction of the phrase "away from home" into the Revenue Act of 1921 is inconclusive as to Congressional intent regarding the meaning of "home." As early as 1927, however, the Board of Tax Appeals held that the precursor of section 162(a)(2) was intended to permit a deduction for traveling expenses only if the expenses were incurred while the taxpayer was away from his "post of duty" or place of employment. *Mort L. Bixler,* 5 B.T.A. 1181 (1927). The word "home" thus became a term of art with a meaning different from its normal usage as residence, domicile or dwelling place; and the "tax home" doctrine was established.

Since the Tax Court's decision in the *Bixler* case the Commissioner has consistently maintained that

"home" in the statute means "tax home" and that one's tax home is one's "home post" or place of employment. This construction has been accepted by a number of courts. See *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945); *O'Toole* v. *Commissioner*, 243 F. 2d 302 (2nd Cir. 1957).

In *Wallace* v. *Commissioner*, 144 F. 2d 407 (9th Cir. 1944), however, this court rejected the "tax home" doctrine and held that the traveling expenses of a taxpayer who regularly lived in San Francisco but visited Los Angeles on business met the statutory requirement that traveling expenses be incurred while away from home. In *Wallace* we unequivocally stated that "home" as used in the statute should be given its ordinary and usual meaning. *Wallace* v. *Commissioner*, *supra*, at 410.

A chance to resolve a conflict among the circuit courts as to the meaning of "home" to which our opinion in *Wallace* contributed came before the Supreme Court in *Flowers* v. *Commissioner*, 326 U.S. 465 (1946). In considering the travel expense deduction the court set out three requirements, each of which had to be met before the deduction would be allowed.

> "(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred 'while away from home.'
>
> (3) The expense must be incurred in pursuit of business * * *."

The court noted the division of opinion regarding the meaning of "home" in the circuit courts but found it unnecessary to reconcile because in its view of the case the expenses involved did not meet the third re-

quirement of being incurred in pursuit of business. *Flowers* thus avoided rather than settled the "home" controversy.

Strictly applied, the "tax home" doctrine would greatly restrict the travel expense deduction; and the Tax Court soon recognized an exception to it in cases where the taxpayer's employment away from home could be considered "temporary." *Chester D. Griesemer*, 10 B.T.A. 386 (1928); *Walter F. Brown*, 13 B.T.A. 832 (1928); accord *Coburn* v. *Commissioner*, 138 F. 2d 763 (2d Cir. 1943). However, where the employment away from home was of indefinite or indeterminate duration, the deduction was denied. *Willard S. Jones*, 13 T.C. 880 (1949). The Commissioner accepted the "temporary-indefinite" distinction and recognized "temporary" employment as an exception to the rule that "home" equals place of employment. I.R.S. Pub. No. 300, 5 CCH 1956 Stand. Fed. Tax Rep. para. 6347; Rev. Rul. 189, 1960-1 Cum. Bull. 60, 65.

The Supreme Court had a second opportunity to clarify the "home" controversy when the question of the scope of the "temporary" employment exception came before it in *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958). In *Peurifoy* three construction workers claimed deduction for living expenses incurred while living for periods of from eight to twenty months at construction sites some distance from their permanent residences. The Tax Court allowed the deductions on the ground that the employment away from home was "temporary." The Fourth Circuit assumed without deciding that the temporary employment exception was valid and that it applied to the "exigencies of the business" requirement as well as the "away from home" requirement set out in *Flowers* v. *Commissioner*, *supra*. The court then reversed because the tax-

payers had not met their burden of proof of showing their employment was temporary and not indefinite.

Upon review on writ of certiorari the Supreme Court made the same assumptions and stated:

> "Generally, a taxpayer is entitled to deduct unreimbursed travel expenses * * * only when they are required by the exigencies of business * * *.
>
> To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case where the taxpayer's employment is 'temporary' as contrasted with 'indefinite' or 'indeterminte.' * * * The respondent does not in the present case challenge the validity of this exception to the general rule."

The Commissioner contends that in *Peurifoy* the Supreme Court approved the temporary employment concept as an exception to its rule in *Flowers* v. *Commissioner, supra,* and that, therefore, a post of indefinite or indeterminate employment necessarily becomes the taxpayer's "tax home." It is clear from the language quoted above, however, that the validity of the temporary employment exception was assumed without decision by the Supreme Court in *Peurifoy* because the court did not consider that a challenge to the exception was before it. The court affirmed on the ground that it would not disturb the circuit court's factual assessment that the employment involved was not temporary. And for the second time the Supreme Court specifically avoided a definition of the word "home."

This was our position in *Harvey* v. *Commissioner,* 283 F. 2d 491 (9th Cir. 1960), when we stated:

> "Peurifoy, then, does not establish the rule, as suggested by the Commissioner, that the place where a taxpayer is employed for an 'indefinite' period, is *necessarily* his tax home."

In *Harvey* the taxpayer maintained his home in Santa Monica, California, where he worked for the Douglas Aircraft Company. From Santa Monica he was transferred on temporary assignment to Edwards Air Force Base, 117 miles away. Taxpayer's tour of duty at Edwards was to be for an indeterminate length of time; he knew only that he would work there as long as he was needed, a period which in the circumstances of his job could be expected to last from a few months to two years. In fact, he remained thirteen months. The Tax Court found Edwards to be the taxpayer's home during the taxable year in question on the ground that his term of employment there was "indefinite." We concluded that when the term "indefinite" was used as the Tax Court used it, the test applied became a mechanical one, incapable of effectuating the purpose of the deduction provision, and we formulated a more flexible test:

> "An employee might be said to change his tax home if there is a reasonable probability *known to him* that he may be employed for a long period of time at his new station. What constitutes 'a long period of time' varies with circumstances surrounding each case. If such be the case, it is reasonable to expect him to move his permanent abode to his new station, and thus avoid the double burden that the Congress intended to mitigate. On the other hand, if it is very likely that taxpayer's stay away from home will be short, then it seems quite unreasonable to expect him to move his domicile, even though it cannot be said that his employment will terminate 'within a fixed or reasonably short period,' to use the words of the Tax Court."

In drawing the distinction between long and short periods of employment we did not reject the distinc-

tions which had been drawn by other courts, but we did reject the inflexible manner in which the distinction had been employed by the Commissioner and the Tax Court. We used the length of employment away from one's established home as a factor in determining what we considered to be the fundamental question in these travel expense cases—is it reasonable to expect the taxpayer to move his residence to his place of employment. Applying this test to the facts of the *Harvey* case, we held that the taxpayer could not reasonably have been expected to move his residence, and the deduction was allowed.[*]

In *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962), we again looked to whether it would be reasonable to expect the particular taxpayer to move his home nearer to the place where he was working in determining the deductibility of claimed travel expenses. In *Wright* the taxpayer commuted daily from his residence in Pocatello, Idaho, to work at Atomic Energy Commission research sites seventy miles away in an inhospitable desert area remote from any town or place of habitation. We held that a taxpayer's inability to maintain a home in the usual sense at his place of employment was a valid reason for allowing the deduction as travel expenses of the resulting costs of transportation, food and lodging. We concluded, however, that the taxpayer had a duty to mitigate his expenses by moving as near to the job site as is reasonable. The deduction in *Wright* was

[*] In *Harvey* v. *Commissioner* both the taxpayer and the Commissioner had stipulated that "home" meant "home post" or place of employment and not place of abode. The meaning of "home" as such was, therefore, not before us, and we inquired only into the application of the distinction between temporary and indefinite employment.

accordingly measured with reference to the nearest habitable community to the employment site, the town of Areo, Idaho. As Areo was neither the taxpayer's actual residence nor his place of employment, our decision in *Wright* necessarily proceeded upon the basis that "home" as used in the statute means residence, with the qualification that the taxpayer should establish his residence as near to his place of employment as is reasonable.

The Commissioner has argued that rejection of the "tax home" doctrine will result in the deductibility of nondeductible commuting and other personal expenses. We think, however, that the words of section 162 limiting deductions to "ordinary and necessary" expenses stand to prevent such a result. It has been clear since the Supreme Court's decision in *Flowers v. Commissioner* that "the exigencies of business rather than the personal conveniences and necessities of [this taxpayer] must be the motivating factors." *Flowers v. Commissioner, supra.*

By placing the emphasis on the "ordinary and necessary" requirement of the statute, there is no necessity for attributing any special "tax sense" to the word "home." Both the Commissioner's distinction between temporary and indefinite employment and the "exigencies of business" test as set out in *Flowers v. Commissioner* look to the duration of employment as a principal factor in separating deductible business expenses from nondeductible personal expenses. The "exigencies of business" test follows directly and naturally from the "ordinary and necessary" requirement of the statute itself. The temporary-indefinite distinction, on the other hand, introduces into the

statute an extraneous concept formulated in the first place only to provide an exception to the Commissioner's strained rule that "home" equals place of employment. Neither the rule nor its exception are necessary and both obscure the fundamental question of whether expenses claimed as travel expenses under section 162 are ordinary and necessary business expenses. Deductibility under the statute need not turn on fictions and inflexible rules of thumb. By looking to the ordinary and necessary requirement of the statute the end result will in most cases be substantially the same, and the unfairness inherent in a strict application of the "tax home" doctrine will be avoided.

"Home" in the statute, then, means home in its ordinary and usual sense, as we stated long ago in *Wallace v. Commissioner*. The length of time a taxpayer is employed away from that home does not itself give the answer, but is a factor in determining the answer to the question whether the taxpayer could reasonably be expected to have moved his home. If it appears reasonable to have expected the taxpayer to move closer to his place of employment, then expenses claimed as travel expenses cannot be said to be "ordinary and necessary." On the other hand, if such a move appears unreasonable, the ordinary and necessary requirement is met, and the deduction will be allowed.

We turn now to the particular facts of the case before us. Taxpayer's duty station in the Far East was dictated by military orders. Marine Corps orders also prohibited him from establishing a home for his dependents in the Far East. There is no question here as to whether it was reasonable for taxpayer to

have moved his home. He had no choice but to maintain a separate residence for his family.[1] Accordingly, we hold that taxpayer's travel expenses while away from home during the taxable year in question were "ordinary and necessary" expenses and are deductible under section 162.

The Commissioner appears to be making the final argument in this case that taxpayer is not entitled to a deduction for the meal expenses because he has failed to show that he would not have been obliged to pay an equal amount for meals at his home post in the United States. The statute, however, specifically provides that "traveling expenses, (including the *entire* amount expended for meals and lodging)" is deductible. [Emphasis added.] We have determined the expenses claimed to have been ordinary and necessary. Taxpayer need make no further showing.

The judgment is reversed.

Ely, Circuit Judge, Dissenting:

I dissent. With our late Brother Orr, one of the noblest of men, I discussed my opposing views, and he, without doubt, would have expected and encouraged me to record them.

When the Marine Corps transferred the taxpayer to his post of duty in Japan, the assignment was for a period of fifteen months. The period was subject to extension by orders of the Marine Corps. As the majority points out, there were forty-nine days

[1] Taxpayer's position is similar to that of the public official who must maintain his home elsewhere than his official place of employment. In such cases the travel expense deduction has been granted. *United States* v. *Le Blanc*, 278 F. 2d 571 (5th Cir. 1960); *Moss* v. *United States*, 145 F. Supp. 10 (W.D.S.C. 1956); *Emmert* v. *United States*, 146 F. Supp. 322 (S.D. Ind. 1955).

during taxpayer's fourteen and one-half months of service in Japan when he was away from his station on temporary duty, placed in "travel status", and reimbursed for his expenses. For the remainder of the period of overseas duty, approximately thirteen months, the taxpayer received from the Government, in addition to his lodging, a tax-exempt payment of approximately $145 per month as a quarters and subsistence allowance. Notwithstanding the fact that the allowance for subsistence was $42.50 per month, the majority upholds the taxpayer's claim that the entire cost of his meals during the approximate thirteen-month period is a tax-deductible expense allowance. In so doing, the majority casts our circuit into direct conflict with Revenue Ruling 55-571, 1955-2 Cum. Bull. 44,[1] and with the decision of the Fourth Circuit in *Bercaw* v. *Commissioner*, 165 F. 2d 521 (1948), wherein the Court wrote,

> "The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance * * *. Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible * * *. This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation."

[1] "members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling 'away from home' and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them."

165 F. 2d at 524. (Citations omitted.) See also *James R. Whitaker*, 24 T.C. 750 (1955).

Regardless of whether or not the taxpayer was "away from home" within the meaning of that language as it is used in section 162(a)(2), the only expenses which are deductible under the section are "traveling expenses". *Commissioner* v. *Flowers*, 326 U.S. 465, 90 L. Ed. 203, 66 Sup. Ct. 250 (1946). "The expense must be a reasonable and necessary *traveling* expense, as that term is generally understood." 326 U.S. 470. [Emphasis added.] It should follow that the question is not whether the taxpayer was "away from home", but whether during the period for which the expense is claimed he was actually "traveling". The Tax Court has determined that he was not, and our duty is to sustain the finding absent demonstration by the taxpayer that the finding was clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 4 L. Ed. 2d 1218, 80 Sup. Ct. 1190 (1960); *Truck Terminals, Inc.* v. *Commissioner*, 314 F. 2d 449, 455 (9th Cir. 1963); *Young* v. *Commissioner*, 268 F. 2d 245 (9th Cir. 1959).

A factual determination of the Tax Court, supported by substantial evidence, should not, on review, be set aside as "clearly erroneous", unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Commissioner* v. *Duberstein*, *supra* at 291, quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 Sup. Ct. 525 (1948), and, in my opinion, the whole body of evidence clearly supports the Tax Court's finding. In the first place, the period of time for which the taxpayer was

assigned to his Japanese post made of that post his "permanent" station in a military sense. In making provisions for "travel and transportation allowances * * * upon a *change* of *permanent* station" (37 U.S.C. § 404(a). [Emphasis added.]), the Congress has recognized that a soldier's "permanent station", being subject to "change", is never permanent in an enduring sense. In the present case, however, the period of assignment, fifteen months with possibility of extension, was factually determined to be an "indefinite" period rather than a "temporary" period, and this should be an important, if not a controlling, consideration. *Puerifoy* v. *Commissioner*, 358 U.S. 59, 3 L. Ed. 2d 30, 79 Sup. Ct. 104 (1958). In the second place, the Marine Corps itself determined that the taxpayer, during his fourteen and one-half months in Japan, was not in "travel status" except for the forty-nine days when he was temporarily detached to locations comparatively short distances from his "permanent" Japanese post. If it be conceded that the Marine Corps' determination should not be conclusive, it nevertheless constitutes strong support for the Tax Court's factual decision. *William W. Todd*, 10 T.C. 655 (1948). See also *Allan Cunningham*, 22 T.C. 906 (1954).

The Congress has undertaken to assure that military men who serve our country overseas shall not suffer undue financial loss. It is provided that the Secretaries of the uniformed services may authorize payment to overseas military personnel of per diem allowances related to the cost of living, "including a cost of * * * subsistence", and such allowance is authorized to be made to the soldier "whether or not he

is in a travel status." 37 U.S.C. § 405, revising in 1962 without substantial change The Career Compensation Act of 1949, ch. 681, § 303(b), 63 Stat. 813. From these provisions I see an intent on the part of Congress that the soldier assigned to overseas duty shall not sustain significant financial loss and that any such loss shall be prevented by the direct payment of travel expenses and increased allowances rather than by tax deduction which might properly be claimed by others for whom no specific increased benefits are provided.[1]

I would affirm the Tax Court.

---

[1] I do not believe that in the selection of qualified military personnel for overseas duty, the Department of Defense should be invited to concern itself with increased cost to the Government depending upon whether one soldier is "away from home" and another soldier, with a different family status, is not.

In the so-called "Cuban crisis" of recent years, we read that the dependents of our military personnel stationed at Guantanamo Bay were removed to the United States. Would the majority say that those servicemen, immediately upon the transfer of their dependents, became "away from home" and commenced to "travel"?

It is anomalous and discriminatory that our servicemen now engaged in Vietnam are entitled, under the majority opinion, to a more favorable tax treatment in our circuit than are those who, while doubtless fighting with equal valor, are denied deductions for their "traveling" expenses in the Fourth Circuit and, apparently, in the Sixth Circuit also. See *Commissioner v. Moton*, 180 F. 2d 859 (6th Cir. 1950), wherein the court wrote, at 861,

"[An armed services officer] is limited in his personal expenditures chargeable to the government, or taxwise deductible, to the usual stipends fixed under appropriate regulations adopted in pursuance of Acts of Congress for his subsistence and travel expenses."

United States Court of Appeals for the Ninth Circuit

No. 19630

HOWE A. STIDGER AND BETT M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States,

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States,

and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is reversed.

Filed and entered December 27, 1965.